1967

Midvale Motors, Inc., A Utah Corporation v. Melvin J. Saunders, Wanda Talbot Saunders, His Wife, et al. : Brief of Respondents

IN THE SUPREME COURT

of the

STATE OF UTAH

MIDVALE MOTORS, INC.,
a Utah Corporation,
Plaintiff-Appellant,

- vs. -

MELVIN J. SAUNDERS, WANDA TALBOT SAUNDERS, his wife, and THOMAS J. IVESTER,
Defendants-Respondents.

MELVIN J. SAUNDERS and WANDA TALBOT SAUNDERS, his wife,
Third party plaintiffs,

- vs. -

ROBERT C. DONIHUE and JESSIE MAY DONIHUE, his wife.
Third party defendants.

Case No.
10626

BRIEF OF RESPONDENTS

Appeal from the Judgment of the 3rd District Court
for Salt Lake County
Hon. Stewart M. Hanson, Judge

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STATEMENT OF NATURE OF CASE

Respondents adopt appellants' statement of the Nature of the Case.

DISPOSITION OF LOWER COURT

Respondents adopt appellants' statement of the Disposition in the Lower Court.

RELIEF SOUGHT ON APPEAL

Respondents are seeking affirmance of the judgment granted by the Third District Court in and for Salt Lake County, Utah, awarding judgment in favor of Defendants-Respondents.

STATEMENT OF FACTS

Respondents agree with appellants' statement of facts which are in brief as follows.

The respondents purchased a house in Kearns, Utah, under a Uniform Real Estate Contract from the Appellants. Respodnents traded their Equity in the Kearns property for an Equity in a Midvale City property by exchanging Quit-Claim Deeds with third party defendants (R. 3, 4). Respondents later learned that third party defendants did not in fact own any equity in the Midvale property and had misrepresented the Midvale property (R. 61). The appellants brought an action to recover the back payments and for an order returning the possession of the property to them (R. 2). Respondents accepted plaintiff demands for a return of the property (R. 4). Thereafter appellant sought to withdraw their demand for possession by striking that portion of the complaint (R. 20). The respondents contested this withdrawal on the ground and for the reason that the complaint constituted an offer and that once that offer was

accepted by the respondent it was a binding agreement and constituted an irrevocable election of remedy and could not be withdrawn. The matter was heard before the Honorable Stewart M. Hanson who ruled in favor of the respondents against the appellants and the appellants appealed.

In this action, Appellants are plaintiff and Respondents are defendants and the parties will be referred to hereafter as appellants and respondents.

STATEMENT OF POINTS

POINT I

THE TRIAL COURT DID NOT ERR IN DECIDING THAT THE ACCEPTANCE OF A REMEDY DEMANDED IN A COMPLAINT CONSTITUTES A BINDING AGREEMENT AND AN IRREVOCABLE ELECTION OF REMEDY.

POINT II

APPELLANT IS NOT ENTITLED AS A MATTER OF RIGHT TO AMEND OR STRIKE THEIR PLEADINGS AND DELETE AN INCONSISTENT THEORY OF RECOVERY.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DECIDING THAT THE ACCEPTANCE OF A REMEDY DEMANDED IN A COMPLAINT CONSTITUTES A BINDING AGREEMENT AND AN IRREVOCABLE ELECTION OF REMEDY.

Respondents fail to see why demand for judgment in a complaint is less binding upon appellant after the same has been accepted, than an offer and acceptance in regard to any contract 17 C. J. S. 362.

If Appellant sellors had sent a letter to respondent purchasers of Real Property asking in the alternative for a cancellation of the contract and return of the possession of the property or for the re-instating of the contract and retention of the possession of the property by bringing the payments to date, and respondent purchasers answered accepting the cancellation and tendered possession to the appellant sellers, would the appellant sellers than be able to prevail upon the alternative remedy of recovery of the back payments? Basic contract law holds that once an offer has been accepted a binding agreement is formed 17 C. J. S. 362. Why should formal pleadings be less binding than any other form of communication between the parties?

Appellant argues that they did not make a valid election of remedy in regard to the three remedies at their disposal because

(1) They did not comply with the Utah Unlawful Detainer Statute 78-36-3 Utah Code Annotated, and admit that they made a mistake in their pleadings.

(2) Respondents were not in a valid position to return possession, much less title.

(3) Remedy must be effecatious in order to be irrevocable, and the opposing party must be detrimentally affected in order to prevail.

Respondent will answer each point made by appellant in order of their presentation.

Appellant certainly does not need to comply with the Unlawful Detainer Statutes to evict a party under a Uniform Real Eastate Contract if the purchaser agrees to the termination of the contract and returning of the possession. The cases cited by Appellant *Perkins vs. Spencer*, 121 Utah 468, 243 P(2) 446 and *Van Zyverden v. Farrar*, 15 Utah 2d 367, 393 P.2d 468, were rulings of this court protecting the purchasers rights before cancellation of a contract would be entertained, this court recognizing that the cancellation of a contract could be, and often is the harshest remedy available to the sellers. This does not prevent, however, the purchaser from waiving these rights and accepting sellers election if the purchaser so desires.

The appellant should not be allowed to benefit from its failure to attempt to comply with the Utah Law in regard to eviction when the same is unnecessary in order to regain possession.

(2) Respondents do not hold the title to the real property, they merely have an equitable possessory interest. The title rests with the appellant.

The respondents had traded their interest in the property under consideration to third party defendants by reason of fraudulent misrepresentations made by third party defendants. In order to return possession to appellant which they had demanded it was necessary for respondents to make an election of remedy of either cancelling the fradulent agreement or affirming it.

The respondents relying upon appellants' complaint elected to cancel the agreement and regain possession of the property in order to turn it over to appellant. This the respondents did. The best answer I can think of to appellants' argument that respondents had no right to turn the possession of the property over to them is that in acuality this is exactly what was accomplished by this law suit, and the trial judge ruled in the conclusions of law (R. 44).

> 3. "That defendants and third party defendants relied upon the election as made by the plaintiff to their detriment in electing to void the contract with third party defendants and the Quit-Claim Deed, and were entitled to void said Quit-Claim Deed and agreement by reason of the fraud of third party defendants . . .".

This also answers appellants argument in regard to detrimental reliance. Surely the judge can take into consideration the pleadings and actions of the parties during the pendency of a lawsuit in arriving at his Conclusions of Law. There is no testimony of any detriment on the part of respondents but the pleadings spell out a detrimental course of action taken by the respondent during the course of the lawsuit that was recognized by the judge and taken into consideration and rightly so.

(3) The next argument raised by appellant is that under the cases of *State Counseling Service, Inc., v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.* 303 F(2) 527 and *Morgan v. Hidden Splendor Mining Co.* 155 F. Supp. 257, the remedy has to be efficatious in order to constitute an election.

This argument seems to lack substance in regard to the facts of the present case. What remedy, of the three appellants had available to him, would not be considered "efficatious and availing," particularly since these are the remedies they contract for.

What it appears the appellant is saying is that the remedy of cancellation of the contract and return of the possession of the property is not an efficatious or an availing remedy and therefore they cannot be bound by an election of this remedy. Yet this is one of the remedies under the Uniform Real Estate Contract that has been considered the most efficatious and availing of any of the remedies available to the sellers. What would be more "efficatious" than cancellation of the contract and the return of the possession of it.

There is conflict of authorities in regard to when an election of remedies is conclusive in pleadings.

The theories of election of remedies is well briefed in 6 A.L.R. (2) 17. In a number of cases it has been held as a general proposition that the commencement of a suit or action is of itself a conclusive election precluding the plaintiff from thereafter pursuing a remedy inconsistent with the first one chosen.

The other concept as stated in 6 A.L.R. (2) 23 states that the commencement of an action is not of itself conclusive.

> "Rejecting the contention that the mere commencement of an action constitutes a conclusive election barring the subsequent prosecution of an incon-

sistent remedy the Court in *Silber v. Gale* 175 NE 886 pointed out that the doctrine of election of remedies is essentially based upon the doctrine of estoppel, and before the same can be invoked, it must be shown that the action of one of the parties has caused the other party to change his position to his detriment."

The Utah Supreme Court in *Cook v. Corey-Ballard Motor Company* 253 P. 196 clearly puts Utah in the first line of decisions holding that the commencement of a suit or action is of itself a conclusive election — not in the second as appellants would have this Court believe.

> "The true rule seems to be (1) that there must be, in fact, two or more existing remedies upon which the party has the right to elect; (2) the remedies thus open to him must be alternative and inconsistent; and (3) he must by actually bringing an action or by some other decisive act, with knowledge of the facts, indicate his choice between these inconsistent remedies. 20 C. J. 19-37, and cases there cited. With such elements present, an election once deliberately made by the institution of a suit, by which the remedy is sought to be recovered, is final, and his failure to secure satisfaction by means of the remedy which he has adopted furnishes no legal reason to permit him to resort to the other.
>
> . . . . And this court has held, where there is a duty of election as to a particular remedy, the bringing of an action based upon one remedy constitutes an irrevocable election, except in case of mistake of fact or other legal excuse."

This case is recognized by the appellant as being the leading case in this jurisdiction in this area of the law.

The case of *Utah Bond & Share Co. v. Chappel,* 251 P. 354 is just not applicable to the fact situation in this case as there was not a suit commenced in that case on an inconsistent remedy.

If the Cook case is applied to the facts of this case as asked in appellants brief then the appellant clearly had made an irrevocable election of remedy when he filed his complaint and one of the remedies prayed for was accepted by the respondents.

Even if the other rule as outlined in 6 A.L.R. (2) 23 were to be followed there was a detrimental reliance and therefore under either rule there has been an irrevocable election of remedy by appellant once the alternative pleading was accepted by the respondents. This is what the trial court found and should be affirmed in this appeal.

POINT II

APPELLANT IS NOT ENTITLED AS A MATTER OF RIGHT TO AMEND THEIR PLEADINGS AND DELETE AN INCONSISTENT THEORY OF RECOVERY.

The appellant does not have an absolute right to amend the pleadings after they have been answered. The Utah Rules of Civil Procedure provides in Rule 15:

> "Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served, or if the pleading is one to which no responsible pleading is permitted and the action has not been placed upon the trial calendar, he may so amend at any time within 20 days after it is served. Otherwise, a

party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . ."

The cases indicate that the determination of when a pleading shall be allowed to be amended is to be within the discretion of the trial court and unless it appears that this discretion has been abused and the complaining party prejudiced thereby the courts ruling in allowing or denying amendments will not be allowed on appeal, *Benson v. Oregon Shoreline Railroad* 99 P. 1072; *Newton v. Tracy Loan and Trust Co.* 40 P(2) 204. In *Badger v. Badger* 254 P. 784 the court held that courts do not look with favor upon striking of pleadings, and motions to strike will be granted only in a clear case. It is quite clear what the appellant in this case wanted to do was to amend his pleadings by eliminating what he then considered the undesirable remedy by striking the remedy from his pleadings. If then the trial court has the discretion to allow or deny the amendment or the striking portions of the appellants complaint and it does not appear that he abused this discretion, then the trial court should be affirmed.

CONCLUSION

There was in fact an offer made to the defendants by the plaintiffs in their complaint to either terminate the Uniform Real Estate Contract by returning he possession or in the alternative to reinstate the contract bringing up to date the back payments. When such an offer was made to the defendants in the complaint, the

defendants had no hesitancy to accpet the alternative provdiing for the termination of the contract and the return of the possesion of the property. They then proceeded to terminate any agreement they might have had with third party defendants in order to give to the plaintiff that which they desired. Once the offer had been accepted, and the action taken by the defendants to comply had been made, the plaintiff should not be placed in a position of changing their minds and be allowed to recover under an alternative remedy. The trial court found as a matter of law from the pleadings and the action of the parties that the appellant had relied upon the plaintiff pleadings to their detriment and that the plaintiff sould be bound by his election once it had been accepted. Substantial justice required the pleadings stand. The trial court in its sound discretion so ruled. The trial court should not now be overruled by this Court.

Respectfully submitted,

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